

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF NorthWestern Energy's)
2011-2012 Electricity Supply Tracker)

REGULATORY DIVISION
DOCKET NO. D2012.5.49

PROTECTIVE ORDER

PROCEDURAL HISTORY

1. On June 1, 2012, NorthWestern Corporation d/b/a NorthWestern Energy (NWE) filed its annual Application for Approval of Electric Supply Deferred Cost Account Balance and Projected Electric Supply Cost. The Montana Public Service Commission (PSC) issued a Notice of Application and Intervention Deadline on June 15, 2012, and an Interim Order on Reconsideration (Order 7219a) on June 29, 2012. The PSC granted intervention to the Natural Resources Defense Council, the Human Resource Council, District XI, and the Montana Consumer Counsel, on July 11, 2012. The PSC issued its Procedural Order in this matter July 27, 2012. The Order set an intervention deadline of July 9, 2012. The PSC issued its Modified Procedural Order November 21, 2012.

2. On July 12, 2012, PSC issued its Data Requests Nos. PSC 006 through PSC 013 to NWE.

3. Subsequent to issuance of Data Requests PSC 006 through PSC 013, Pratt & Whitney Power Systems, Inc. (PWPS) became aware of the Data Requests and recognized that the Data Requests encompassed Information containing Trade Secrets of PWPS.

4. On August 23, 2012, PWPS filed its Motion to Intervene in this Docket for the limited purpose of filing for a Protective Order. PWPS simultaneously filed its Motion For Protective Order and Affidavit of David M. Jones in Support of Protective Order.

5. On _____, 2013, the PSC published notice of the Motion for Protective Order in its weekly agenda, stating it would not rule on the Motion for at least 10 days, and that it would accept comments submitted prior to the ruling.

6. On August 23, 2012, NWE filed responses to Data Requests PSC 006 through PSC 013. In those Responses, NWE indicated it was not including certain documents within the scope of PWPS's Motion For Protective Order, pending the PSC's action on PWPS' Motion.

FINDINGS OF FACT

7. PWPS has conducted business with NWE in the past and will likely continue to conduct business with NWE in the future. Jones September 5, 2012 Affidavit ¶2, Tymchenko January 14, 2013 Affidavit §2. PWPS's interest is in protecting confidential trade secret information contained in documents possessed by NWE, including correspondence between PWPS and NWE and attachments to such correspondence, including but not limited to reports, related to operational problems involving PWPS turbines at DGGS" (PSC-006(c) and (d)), and correspondence to NWE from PWPS employees relating to insurance or warranty coverage offered by PWPS other than the PWPS turbine warranty which has become a public document in earlier PSC proceedings (PSC-008 (a), (b) and (c)). Jones Affidavit ¶¶ 3, 4, Tymchenko Affidavit §3.

8. The electrical generating industry in Montana and elsewhere is highly competitive and product and service providers to this industry aggressively market their products and services. Jones September 5, 2012 Affidavit ¶ 5, Tymchenko Affidavit §3. Possession of the Information for which protection is sought would give PWPS's competitors distinct competitive advantage based on knowledge of PWPS's negotiations and business dealings with NWE, as well as PWPS' sensitive

technical data relating to its products and services. Jones Affidavit §§ 5, 6, Tymchenko Affidavit §3.

9. Possession of the Information for which protection is sought would give other present and future potential customers of PWPS distinct competitive advantage with respect to negotiations with PWPS based on knowledge of PWPS's negotiations and business dealings with NWE, as well as PWPS' sensitive technical and financial data relating to its products and services. Jones September 5, 2012 Affidavit ¶¶ 5, 6, Tymchenko Affidavit §3.

10. PWPS has a direct and substantial interest in disclosure of the information contained in documents possessed by NWE which PWPS asserts are trade secrets. PWPS Second Supplemental Motion For Protective Order, ¶ 3.

11. Public disclosure of PWPS's confidential and trade secret information would cause PWPS economic injury. Jones September 5, 2012 Affidavit ¶¶ 5, 6, Tymchenko Affidavit §3.

12. PWPS has considered that the PSC is a public body and that there is a constitutional presumption in favor of disclosing materials provided to the PSC. Jones September 5, 2012 Affidavit ¶ 8, Tymchenko Affidavit §4.

13. PWPS has taken reasonable steps to maintain the secrecy the Information for which protection is sought. PWPS Second Supplemental Motion for Protective Order ¶ 10; Jones September 5, 2012 Affidavit ¶ 6, Tymchenko Affidavit §3.

CONCLUSIONS OF LAW

14. The PSC has jurisdiction over this matter pursuant to Title 69, chapter 3, MCA, and "may issue a protective order when necessary to preserve trade secrets . . . as required to carry out its regulatory functions." MCA 69-3-105(2).

15. “Any person interested in and directly affected by the subject matter of any hearing or investigation pending before the commission may petition to become a party thereto.” ARM 38.2.2401. Petitions for intervention filed after the intervention deadline established by a Procedural Order must show good cause. ARM 38.2.2403.

16. Montana’s constitution imposes “an ‘affirmative duty’ on government officials to make all of their records and proceedings available to public scrutiny.” *Great Falls Tribune v. Mont. Pub. Serv. Commn.*, 2003 MT 359 ¶ 54, 319 Mont. 38. However, “a trade secret is one form of information in which there is a statutorily defined property right.” *Id.* at ¶ 59.

17. An entity seeking a protective order “must support its claim of confidentiality by filing a supporting affidavit making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements.” *Great Falls Tribune*, ¶ 56. “The claimant’s showing must be more than conclusory” and “must make clear . . . the basis for the request.” *Id.*; ARM 38.2.5007(3).

18. A motion for protective order must include a complete and specific nonconfidential identification, description and explanation of the information, item by item or by category of items which are alike, of all information for which protection is requested, suitable for meaningful use in testimony, arguments, public discussion, orders and the public record. ARM 38.2.5007(3)(b).

19. In order to claim a trade secret as the basis for a protective order, the claimant must demonstrate that: (1) It has considered the Commission is a public agency and that there is a Constitutional presumption of access to documents and information in the Commission’s possession; (2) the claimed trade secret material is information; (3) the information is secret; (4) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy; (5) the

secret information is not readily ascertainable by proper means; and (6) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy. ARM 38.2.5007(4)(b).

20. “Information” includes “knowledge, observations, opinions, data, facts, and the like.” ARM 38.2.5001(3).

21. PWPS has made a *prima facie* showing that correspondence, attachments to correspondence, between NWE employees and employees of PWPS related to operational problems involving PWPS turbines at DGGS, including those documents specified in PWPS’ Second Supplemental Motion For Protective Order, which may be submitted to the PSC by NWE in response to DR PSC 006(c) and (d) and PSC 008(a), (b) and (c), are trade secrets entitled to protection under constitutional due process requirements and the PSC rules.

ORDER

IT IS HEREBY ORDERED THAT:

- 23. PWPS’ Second Supplemental Motion For Intervention for purposes of obtaining a Protective Order is granted;
- 24. PWPS’ Motion For Protective Order is granted; and
- 25. Information submitted in accordance with this Protective Order shall be treated as confidential pursuant to ARM Title 38, subchapter 50.

DONE IN OPEN SESSION at Helena, Montana the ____ day of _____, 2013, by a vote of 5-0.

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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

W. A. Gallagher, Chairman

Bob Lake, Vice Chair

Travis Kavulla, Commissioner

Roger Koopman, Commissioner

Kirk Bushman, Commissioner

ATTEST:

Aleisha Solem
Commission Secretary

(SEAL)

NOTE: Reconsideration is not available in regard to the granting of a motion for protective order, but is available in regard to the denial of a protective order. ARM 38.2.4806. A person with proper standing may challenge a protective order. ARM 38.2.5008(3).

Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

ARM 38.2.5012

Docket No. D2012.4.49, Order No. _____
Order Action Date: _____, 2013

I understand that in my capacity as counsel or expert witness for a party to this proceeding before the commission, or as a person otherwise lawfully so entitled, I may be called upon to access, review, and analyze information which is protected as confidential information. I have reviewed ARM 38.2.5001 through 38.2.5030 (commission rules applicable to protection of confidential information) and protective orders governing the protected information that I am entitled to receive. I fully understand, and agree to comply with and be bound by, the terms and conditions thereof. I will neither use nor disclose confidential information except for lawful purposes in accordance with the governing protective order and ARM 38.2.5001 through 38.2.5030 so long as such information remains protected.

I understand that this nondisclosure agreement may be copied and distributed to any person having an interest in it and that it may be retained the offices of the provider, commission, consumer counsel, any party and may be further and freely distributed.

Typed or Printed Name

Signature

Date of Signature

Business Address:

Employer

Party Represented